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6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 UNITED STATES OF AMERICA,)

9 Plaintiff,)

10 v.)

11 GREGORY P. BURLESON,)

12 Defendant.)
13 _____)

CASE NO.: 2:16-CR-00046-3-GMN-PAL

14 MOTION TO RECONSIDER MAGISTRATE'S DECISION TO DENY PRETRIAL RELEASE

15 COMES NOW Defendant, GREGORY P. BURLESON, by and through counsel,
16 TERRENCE M. JACKSON, ESQ., and moves this Court pursuant to 18 U.S.C. § 3145(b), to
17 reconsider the decision of the Magistrate on March 25, 2016, (Dkt. 196) to deny Gregory Burleson
18 pretrial release.

19 This Motion is based upon the accompanying Points and Authorities incorporated herein, and
20 such facts as will come before this Honorable Court on an evidentiary hearing of this Motion. *See,*
21 *United States v. Koenig*, 912 F.2d 1190 (9th Cir.1990). At such an evidentiary hearing, the
22 Defendant will establish that he is neither a risk to flee, nor is he a risk of harm to anyone. The
23 Defendant will also establish that there exists a combination of conditions that will ensure his
24 appearance and guarantee he does not present even a remote or theoretical risk of harm to society
25 at this time.

26 POINTS AND AUTHORITIES

27 I. WEIGHING ALL THE FACTORS OF 18 U.S.C. § 3142 IT IS CLEAR THAT THE
28 DEFENDANT MUST BE RELEASED BECAUSE HE IS EXTREMELY UNLIKELY TO
FLEE OR TO PRESENT ANY DANGER TO THE COMMUNITY.

§ 3142 lists the factors a court should consider in deciding the question of pretrial release:

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person including-
 - (A) the person's character, physical and mental condition, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, record of appearances in court proceedings, and
 - (B) whether at the time of the current offense or arrest the person was a probationer, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law, and
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the persons release, 18 U.S.C. § 3142(g).

The Ninth Circuit Court of Appeals has expressly found that the least important of the four factors is the weight of the evidence against the defendant in determining a defendant's future for pretrial release. *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir.1991), *United States v. Winsor*, 785 F.2d 755, 757 (9th Cir.1986), *United States v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir.1985).

Defendant submits the weight of the evidence against him and his role in the alleged conspiracy has been greatly exaggerated by the government. However, even if the government has in fact gathered and prepared voluminous evidence suggesting the Defendant's guilt, that should not preclude his release from custody. In this case the Defendant, because of his total blindness, is totally incapable of inflicting physical harm on others. Other serious health problems including a longtime seizure disorder plague the Defendant and make him physically incapable of inflicting any harm on the public. It is the Defendant, who has been denied many of his necessary medicines, who is the individual suffering great physical harm from the denial of pretrial release.

II. THE GOVERNMENT CANNOT SHOW BY A PREPONDERANCE OF EVIDENCE THAT GREGORY BURLESON IS A FLIGHT RISK.

There has been no showing Defendant has shown any intent or done any overt actions

1 showing that he will not appear or has there been a showing that he will flee if released. In his
 2 crippled, blind condition, flight is nearly impossible. It has been held that even the ability to flee does
 3 not justify detention. *United States v. Himler*, 797 F.2d 156 (3rd Cir.1986).

4 Gregory Burleson's ability to flee is nonexistent in any practical sense. Condition of release
 5 can be fixed to totally eliminate any possibility of his nonappearance.

6 III. THE LIKELY GREAT LENGTH OF TIME BEFORE A TRIAL WILL COMMENCE IN
 7 THIS CASE IS A FACTOR WHICH WEIGHS HEAVILY FOR PRETRIAL RELEASE.

8 At the Court ordered discovery conference, counsel for the Government and all defense
 9 attorneys present agreed the trial, because of its complexity, cannot begin before early 2017 and will
 10 take at least five weeks to complete. It is possible this estimate is conservative and it will likely be
 11 more that a year and a half before the trial culminates. In any event, Defendant is facing at minimum
 12 upwards to a year in pretrial custody if not granted pretrial release.

13 Numerous case have considered the length of pretrial delay a factor in granting release. See,
 14 for example, *United States v. Gelfuso*, 838 F.2d 358 (9th Cir.1988), *United States v. Colombo*, 777
 15 F.2d 96 (2nd.Cir. 1985), *United States v. Gatto*, 750 F.Supp. 664 (D. N.J. 1990).

16 IV. THE GOVERNMENT CANNOT ESTABLISH BY CLEAR AND CONVINCING
 17 EVIDENCE THERE ARE NO CONDITIONS THAT WILL REASONABLY ASSURE
 18 THE SAFETY OF PERSONS OR THE COMMUNITY.

19 18 U.S.C. § 3142(F) puts the burden on the Government to show by clear and convincing
 20 evidence there are **no** conditions that will ensure the Defendant will not endanger others. Defendant
 21 suggested numerous conditions to this Court that remove any possibility of him harming others:

- 22 (1) restrict his access to all weapons;
- 23 (2) restrict his access to the internet;
- 24 (3) restrict his access to all co-defendants or others who might be engaged in harmful
- 25 activity by phone, personal contact, or internet.

26 Because the Defendant is totally blind, he cannot physically injure others by his hands, by
 27 use of weapons or otherwise because he cannot see them. If he is ordered not to communicate with
 28 others who might wish to inflict harm, he cannot in anyway cause harm to specific individuals or

1 general harm to the community. The mere fact in the past he may have committed or threatened
 2 violent acts does not make him a danger to the safety of others now. Keeping him locked up pretrial
 3 merely violates the Eighth Amendment's ban on pretrial punishment. See, *United States v.*
 4 *Kogomadian*, 601 F.Supp. 1501.

5 CONCLUSION

6 There do exist conditions that will prevent Defendant from fleeing and prevent him from
 7 being a risk of harm to the community. Keeping him incarcerated would violate his rights under both
 8 the Bail Reform Act of 1984 and the Eighth Amendment. It would amount to unnecessary and
 9 unwarranted pretrial punishment and this court should deny the prosecutor's request to detain
 10 Defendant pretrial but instead release him with reasonable conditions on pretrial release. The
 11 Defendant has clearly rebutted the presumption he is a danger to the community because he is
 12 charged with a crime of violence. The Magistrate's reliance on this presumption alone ignores the
 13 singular facts of the Defendant's current condition.

14 In *United States v. Leyba*, 104 F.Supp.2d 1182 (S.D. Iowa 2000), the court recognized the
 15 rebuttable presumption relied on by the Magistrate should be construed narrowly stating:

16 "Thus, when there exists a rebuttable presumption, the burden falls to the
 17 defendant to show factual evidence that he will appear for trial and does not pose a
 18 threat to the safety of others of the community. However, the ultimate burden
 19 remains with the Government to show, by clear and convincing evidence, that there
 20 are no conditions of pretrial release which will reasonably assure the defendant's
 21 appearance and safety of others and the community when an order of pretrial
 22 detention is sought. Absent such a showing by the Government, pretrial release
 23 should be granted." *United States v. Leyba*, 104 F.Supp.2d 1182, 1183 (S.D. Iowa
 24 2000) (Emphasis added)

25 The Government did not meet its burden in this case of clear and convincing danger to the
 26 community, and therefore the Defendant should be released.

27 DATED this 31st day of March, 2016.

28 /s/ Terrence M. Jackson
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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I hereby certify that service of the above entitled MOTION TO RECONSIDER
MAGISTRATE'S DECISION TO DENY PRETRIAL RELEASE was made this 31st day of March,
2016, upon the parties in this action by CM/ECF (electronic filing) as follows:

DANIEL G. BOGDEN

United States Attorney

NICHOLAS D. DICKINSON

Assistant United States Attorney

NADIA AHMED

Special Assistant United States Attorney

STEVEN MYHRE

First Assistant United States Attorney

By: /s/ Ila C. Wills

Legal Assistant to Terrence M. Jackson